

The Award entered by the Administrative Law Judge should be affirmed.

The findings of fact and conclusions of law as enumerated in the Award by the Administrative Law Judge are found to be accurate and appropriate and are hereby adopted by the Appeals Board as its own as if specifically set forth herein. The Appeals Board agrees that claimant has sustained his burden of proof and is entitled to permanent partial disability benefits based upon a work disability of seventy and one-half percent (70.5%).

It is correct, as respondent argues, that Dr. Lawrence R. Blaty testified to additional tasks which, in his opinion, claimant could perform. However, those tasks were the product of respondent counsel's cross examination and were of his own creation. They were not the essential tasks as defined by the only vocational expert to testify in this case. The Appeals Board finds that the fourteen (14) job tasks which Dr. Blaty relied upon in his opinion that claimant retains the ability to perform eight (8) of those tasks, were reasonable descriptions of the essential job functions performed by claimant during the fifteen (15) years prior to his injury and, further, were consistent with claimant's testimony. It is always possible to reshape or redefine tasks. For example, claimant testified that his job as a plumber required him to carry and operate "snakes" ranging in weight from forty (40) to one hundred fifty (150) pounds. Respondent's counsel correctly points out, and Dr. Blaty agreed, that claimant could continue to lift weights of up to fifty (50) pounds whereby he could continue to perform the task of snaking out drains using the forty (40) pound machine. Nevertheless, claimant testified that he was required to use all of the various machines as a part of his job and, furthermore, that he primarily used the one hundred fifty (150) pound machine in the course of his particular work. It was reasonable for Dr. Blaty to treat this as one task as opposed to several different tasks in forming his opinion. In the absence of compelling evidence to the contrary, the Appeals Board will accept the tasks as defined by the claimant, the vocational expert and the physician and will avoid in engaging in the type of speculation and gamesmanship respondent would have us follow, whereby tasks can be subject to any number of definitions according to whichever best serve the interest of a particular party.

With regard to the claimant's wage loss, the Administrative Law Judge found claimant to be averaging a weekly wage of one hundred dollars (\$100.00) after the injury. He arrived at this figure, based upon the claimant's testimony that over the past fifty (50) weeks he had worked since his accident he had earned a total of approximately five thousand dollars (\$5,000.00). Respondent points out that claimant also testified that he earned ten dollars and seventy-five cents (\$10.75) per hour at one particular job and, therefore, the Appeals Board should impute an average weekly wage based upon this hourly rate times forty (40) hours per week. The respondent's position fails to take into consideration the fact that claimant testified that due to his injuries he was unable to continue to perform the job that allowed him to earn the ten dollars and seventy-five cents (\$10.75) per hour. Claimant considered that job to exceed his restrictions. Furthermore, although claimant testified he worked three weeks at that job, he never indicated how many hours he worked per week or how much per week he earned while so employed. Claimant did testify that the most he earned in any given week since his accident was one hundred seventy-six dollars (\$176.00). He has worked a variety of temporary jobs through a temporary job service that has not provided him with steady, full-time employment. Therefore, the Appeals Board finds that the approach taken by the Administrative Law Judge, in this instance, is a more accurate reflection of claimant's post-accident average weekly wage.

The Appeals Board adopts the analysis of the evidence by the Administrative Law Judge regarding the nature and extent of claimant's disability. Specifically, the Appeals Board finds that the claimant proved by a preponderance of the credible evidence that he has lost the ability to perform fifty-seven percent (57%) of the work tasks that he performed during the fifteen (15) year period preceding the accident and that the difference between the stipulated average weekly wage that claimant was earning at the time of his injury and

the average weekly wage he has earned since results in a loss of eighty-four percent (84%). When averaged together, the claimant has established a permanent partial general disability of seventy and one-half percent (70.5%).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated October 31, 1995 should be, and hereby is, affirmed in all respects and the orders contained in the Award are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
 James A. Cline, Wichita, KS
 John D. Clark, Administrative Law Judge
 Philip S. Harness, Director